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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LINDA HONG,

Cross-complainant and Appellant,

v.

WON BEOM LEE et al,

Cross-defendants and Respondents.

G050737

(Super. Ct. No. 30-2011-00534180)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Linda S. Marks, Judge. Affirmed in part, reversed in part, and remanded.

Park & Sylva, Daniel E. Park and Christopher C. Cianci for
Cross-complainant and Appellant.

Law Offices of Tom S. Chun and Tom S. Chun for Cross-defendants and
Respondents.

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Cross-complainant and appellant Linda Hong (Hong) appeals from the judgment entered after the trial court granted cross-defendants and respondents Won Beom Lee (Won Beom) and Joung Hee Kea (Joung Hee; collectively Respondents)¹ nonsuit on Hong's cross-complaint. The trial court concluded Hong failed to present sufficient evidence to establish the essential element of damages.

We agree the evidence Hong presented was insufficient to support an award of monetary damages on her alleged claims, but not all of Hong's claims sought damages. In addition to her claims for breach of contract and various torts, Hong also alleged claims for declaratory relief and constructive trust. Specifically, Hong sought a judicial declaration that she held a 50-percent ownership interest in a new health spa business after Respondents allegedly locked Hong out of the original health spa business she owned with them at the same location. Hong also sought a judgment imposing a constructive trust on 50 percent of the new spa business. Neither of these claims asks for damages. We therefore reverse the judgment for Respondents on the declaratory relief and constructive trust claims, but affirm the judgment in all other respects.

Hong contends the trial court also erred in excluding the parties' accountant from testifying about her damages and denying her request to reopen her case to present additional evidence. As explained below, we conclude the trial court did not abuse its discretion in either of these rulings because Hong failed to designate the accountant as an expert witness and she did not seek to reopen her case until the parties had rested and the trial court already had ruled on Respondents' motion.

¹ We refer to the members of the Lee and Kea family by their first names to avoid confusion.

I

FACTS AND PROCEDURAL HISTORY

Hong was married to Howard Kea, who was Joung Hee's older brother and Won Beom's brother-in-law. Howard was an ambitious businessman who started in the construction business before purchasing and operating restaurants and nightclubs. In the early 2000's, he decided to build and operate large Korean-style health spas. Along with Hong, he opened the first Imperial Health Spa in Garden Grove, California, in 2002. Starting in 2003, Joung Hee managed the spa for Howard.

In 2004, Howard decided to sell Joung Hee a 50-percent interest in the Garden Grove spa for \$1.25 million, and he memorialized the transaction in a "Business Partnership Agreement" executed by Hong and Won Beom. Neither Howard nor Joung Hee signed the agreement. The agreement called for Hong and Won Beom to jointly supervise and operate the spa and also granted each other a right of first refusal should the other decide to sell their 50-percent interest. After this agreement, Joung Hee continued to manage the spa with only occasional input from Howard.

In October 2008, Howard asked Joung Hee to temporarily step down as the Garden Grove spa's manager and surrender her right to receive 50 percent of the profits. He explained he was constructing a new spa in Fullerton, California, and needed the funds generated by the Garden Grove spa to help finance the construction. In exchange, he promised to pay Joung Hee \$10,000 per month to cover her living expenses and return control to her after he completed construction and paid for the Fullerton spa. Joung Hee agreed and stopped going into the Garden Grove spa in October 2008. Howard assumed control and began operating the Garden Grove spa at that point. Hong did not help Howard with the Garden Grove spa because she was helping him operate his new spa in Las Vegas, Nevada. Howard made the first two monthly payments to Joung Hee, but starting in January 2009 made no further payments.

When Howard suddenly passed away in May 2010, Joung Hee resumed managing the Garden Grove spa. In early June 2010, the spa's landlord served a "3-Day Notice to Pay Rent or Move Out" and Joung Hee learned for the first time that Howard had not paid rent for more than five months. The landlord then filed an unlawful detainer action and obtained a judgment for possession of the property because the business lacked sufficient funds to pay the nearly \$210,000 in back rent. In early July 2010, the sheriff served a notice for the spa to vacate the premises.

After the eviction, Hong asked the landlord for a new lease to allow her to operate the spa without Respondents, and Joung Hee asked for a new lease to allow her daughter, Eun Joo Lee (Eun Joo), to operate the spa without Hong. The landlord decided to lease the property to Eun Joo. The new lease required her to make a \$300,000 deposit, which the landlord agreed to accept in installments. Respondents provided Eun Joo with the money to make the deposit and Joung Hee also guaranteed the lease and helped run the spa. Eun Joo assumed control of the spa and spent approximately \$600,000 to \$700,000 to refurbish the facilities, including the removal of an illegal swimming pool Howard had installed. Hong had no role in the spa under the new lease.

In December 2011, Respondents and Howard's other siblings sued Hong, alleging they each had made significant loans to Howard to help finance his construction of the Fullerton and Las Vegas spas and he failed to repay the loans before his death. They alleged Hong was liable for the loans because she was Howard's business partner. Hong filed a cross-complaint against Respondents asserting claims for breach of written contract, breach of the implied covenant of good faith and fair dealing, conversion, constructive fraud, breach of fiduciary duty, conspiracy, declaratory relief, and constructive trust.² Hong alleged Respondents breached their duties under the Business

² Hong's cross-complaint also named Howard's other siblings, Eun Joo, and the Garden Grove spa's landlord as cross-defendants, but the claims against those parties were dismissed and they are not at issue on this appeal.

Partnership Agreement when they converted her interest in the Garden Grove spa by allowing the landlord to evict the partnership from the property, entering into a new lease with the landlord to operate the same business at the same location, and excluding her from that business.

The trial court conducted a jury trial on both the complaint and the cross-complaint. During trial, the court refused to allow Hong to call Dale Kim, an accountant for all the parties, to testify about the value of the interest Hong allegedly lost in the Garden Grove spa or the amount of her lost profits. The court explained those matters constituted expert opinion, but Hong failed to designate Kim as an expert. After the parties rested, Respondents moved for nonsuit on Hong's cross-complaint, arguing Hong failed to present sufficient evidence showing they breached any duty they owed Hong or the amount of damages Hong allegedly suffered.³

The court granted the motion and dismissed Hong's entire cross-complaint: "Based on the fact that there is not an expert to testify regarding damages, the court is going to be granting that nonsuit as to the cross-complaint at this time because there is a failure of proof, insufficient evidence to take this case to the jury based on the allegations in the cross-complaint, particularly the element of damages since there has been no testimony – competent testimony that the jury has heard regarding the damages in the case." The court then entered judgment against Hong and this appeal followed.

³ Hong also moved for nonsuit on the complaint filed against her. The trial court granted Hong's motion and that ruling is the subject of a separate appeal.

II

DISCUSSION

A. *Hong Failed to Show the Trial Court Abused Its Discretion in Excluding an Undesignated Expert's Testimony*

Hong contends the trial court erred in preventing accountant Kim from testifying based on Hong's failure to designate Kim as an expert witness. According to Hong, she had no obligation to designate Kim as an expert because Kim served as the accountant for all the parties and therefore would have testified as a percipient witness rather than an expert witness. Hong misconstrues the nature of Kim's testimony.

When any party serves a timely demand, all parties must simultaneously exchange information concerning their "expert trial witnesses." (Code Civ. Proc., § 2034.210.) The exchange must include "[a] list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial." (*Id.* at § 2034.260, subd. (b)(1).) For each expert witness who is a party, is an employee of a party, or "has been retained by a party for the purpose of forming and expressing an opinion," the exchange also must include an expert witness declaration briefly explaining the expert's qualifications, anticipated testimony, fees, and certain other matters. (*Id.* at §§ 2034.210, subd. (b), 2034.260, subd. (c).) If requested, the parties also must produce "all discoverable reports and writings" the expert generated in preparing his or her opinion. (*Id.* at §§ 2034.210, subd. (c), 2034.270.)

Failure to comply with the exchange requirements can have drastic consequences. (*Staub v. Kiley* (2014) 226 Cal.App.4th 1437, 1445.) On the objection of any party who complied with the exchange demand, "the trial court *shall exclude* from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to" designate a witness as an expert, submit an expert declaration, produce discoverable reports and writings, or make an expert available for deposition.

(Code Civ. Proc., § 2034.300, italics added.) We review a trial court’s ruling on a motion to exclude expert testimony for abuse of discretion. (*Staub*, at p. 1455.)

Here, it is undisputed Hong made a demand for an exchange of expert witness information, and then failed to designate Kim or any other person as an expert witness. At trial, Hong nonetheless sought to call Kim to testify about the damages Hong suffered when Respondents allegedly excluded her from the Garden Grove spa and then started a new spa business at the same location without her. The trial court refused to allow Kim to testify based on Hong’s failure to designate Kim as an expert witness, explaining “my understanding is the subject matter of [Kim’s] testimony would deal with issues of profit and loss and valuation, clearly falling within the purview of an expert witness. . . . Based on the fact that an accountant in this kind of case would be testifying to – would have the requisite skill, expertise, and knowledge that would be beyond a layperson’s understanding.”

Hong did not dispute the trial court’s conclusion that Kim would offer opinion testimony about the spa’s profits and the value of Hong’s interest in the spa. Instead, Hong argued Kim’s opinion testimony would constitute lay opinion testimony rather than expert witness testimony “based upon the fact that Mr. Dale Kim has served as the accountant for all the parties here.” To support this contention, Hong now quotes the following statement from *Hurtado v. Western Medical Center* (1990) 222 Cal.App.3d 1198, 1203 (*Hurtado*): “Because a percipient expert is not given information by the employing party, but acquires it from personal observation, the current statute treats him or her as a fact witness. Requiring an attorney to analyze such a witness’s anticipated testimony and submit the analysis to the opponent would invade the absolute protection given by the work product doctrine to the thought processes of an attorney in preparation for trial.” *Hurtado* does not support Hong’s contention.

Hurtado addressed “[t]he distinction between retained experts and other experts,” not the difference between lay opinion testimony and expert opinion testimony.

(*Hurtado*, *supra*, 222 Cal.App.3d at p. 1203.) There, the plaintiff had designated several of her treating physicians as witnesses whose expert opinion she intended to offer at trial, but the plaintiff took the position it was the defendant's burden to arrange the physicians' depositions because the plaintiff had not hired the physicians to form or express an opinion. The Court of Appeal agreed. Because the treating physicians would base their expert opinions on information they personally observed in treating the plaintiff rather than information the plaintiff provided for their review, the treating physicians were treated as fact or percipient witnesses and therefore the plaintiff did not have to arrange their depositions. Nonetheless, the plaintiff still had to designate her physicians as experts before she could call them to express an expert medical opinion at trial. (*Id.* at pp. 1202-1203.)

Here, Kim would not be a retained expert if his opinions about the value of the spa and lost profits are based on information he personally observed as the parties' accountant. Assuming Kim was not a retained expert, Hong was not required to provide an expert witness declaration about Kim and his anticipated testimony (Code Civ. Proc., §§ 2034.210, subd. (b), 2034.260, subd. (c)), nor was Hong required to produce Kim for deposition (*Hurtado*, *supra*, 222 Cal.App.3d at p. 1203). But if Hong intended to offer Kim's expert testimony about the value of the spa or lost profits, Hong still was required to designate Kim as an expert. (Code Civ. Proc., § 2034.260, subd. (b)(1).)

"An opinion is an inference or conclusion the witness draws from his or her observations." (Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2015) ¶ 8:627, p. 8C-97 citing *Wheeler v. St. Joseph Hosp.* (1977) 63 Cal.App.3d 345, 362.) A lay or nonexpert witness may offer opinion testimony that is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800.) A lay opinion is admissible only if based on matters the witness personally observed (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306-1308 (*McAlpin*)) and the subject matter is within common knowledge or experience (*People v.*

Allen (1976) 65 Cal.App.3d 426, 436 (*Allen*), disagreed with on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 39, fn. 25).

In contrast, an expert may offer opinion testimony if it is (1) “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact,” and (2) “[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.” (Evid. Code., § 801.) Accordingly, opinion testimony constitutes expert testimony when it is beyond the scope of common knowledge and experience or based upon information the witness did not personally observe. (*People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896; *McAlpin*, *supra*, 53 Cal.3d at pp. 1306-1308; *Allen*, *supra*, 65 Cal.App.3d at p. 436.)

Hong offers no explanation or authority to show how a person could offer an opinion on the value of the spa based upon their observations and common knowledge or experience. To the contrary, value is a calculation that must be conducted based upon a variety of factors, such as goodwill, income, expenses, and debts, and those factors vary depending on the nature of the business and the purpose of the valuation. (See *People ex rel. Dept. of Transportation v. Leslie* (1997) 55 Cal.App.4th 918, 922-923.) Any opinion Kim offered on the spa’s value necessarily would rely upon his specialized knowledge as an accountant and be based on information Hong and others provided, not solely on his personal observations. The spa’s past or future profits likewise require calculations based on revenue and expenses and Kim necessarily would base his opinion

on specialized knowledge and information he received from others. The trial court therefore did not abuse its discretion in excluding Kim’s testimony.⁴

B. *The Trial Court Properly Dismissed All Causes of Action With Damages as an Essential Element*

1. The Standards for Directed Verdicts Govern this Appeal

Although Respondents referred to their motion as a motion for nonsuit, it was actually a motion for directed verdict because it was made after the parties had presented their evidence and rested. Code of Civil Procedure section 581c authorizes a defendant to move for nonsuit either after the plaintiff has completed its opening statement or after the plaintiff has presented its evidence to the jury. (Code Civ. Proc., § 581c, subd. (a).) If the motion is denied, the defendant may proceed to present its evidence to the jury. (*Ibid.*) Code of Civil Procedure section 630 authorizes either a plaintiff or a defendant to “move for an order directing entry of a verdict in its favor” “after all parties have completed the presentation of all of their evidence in a trial by jury.” (*Id.* at § 630, subd. (a).)

The distinction between the two motions often is irrelevant because both operate as a ““demurrer to the evidence,”” conceding the truth of the facts proved and contending they are insufficient as a matter of law to support the plaintiff’s case. (See *Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 309

⁴ In requiring a trial court to exclude testimony from undesignated expert witnesses, Code of Civil Procedure section 2034.300 also requires that the party’s failure to designate the witness be “unreasonabl[e].” Here, Hong’s failure to designate Kim was unreasonable because her damages only could be established through expert testimony, and her failure to designate Kim deprived Joung Hee and Won Beom of the opportunity to depose Kim and determine his opinion and the basis for it before trial. Hong does not argue her failure was reasonable, and therefore waived any contention that it was. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.)

[directed verdict]; *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 876 [nonsuit].) In ruling on either motion, the trial court must accept as true the evidence most favorable to the nonmoving party, disregarding conflicting evidence and indulging every legitimate inference in the nonmoving party's favor; the court may not weigh the evidence or consider the credibility of witnesses. (See *Wilson v. Merritt* (2006) 142 Cal.App.4th 1125, 1133 [nonsuit]; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629-630 [directed verdict]; see *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 479 ["In ruling upon a defense motion for a directed verdict, the trial court is guided by the same standard used in evaluating a motion for a nonsuit"].) The motion may be granted only when there is no evidence to support a jury verdict in the nonmoving party's favor. (*Ibid.*)

We address the significant differences between a nonsuit motion and directed verdict motion below as relevant, but we review a trial court's ruling on both motions de novo and apply the same standards as the lower court. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214-1215 [nonsuit]; *North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, 920 [directed verdict]; *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1060 [nonsuit].)

2. Hong Failed to Present Sufficient Evidence to Establish the Amount of Her Damages

Hong contends the trial court erred in dismissing her claims because she presented sufficient evidence of the damages Respondents caused by locking her out of the Garden Grove spa and starting a new spa business at the same location. According to Hong, she presented sufficient evidence to support an award of damages based on either of two measures. We disagree.

"The burden of proof is on the plaintiff to prove his damages with reasonable certainty. [Citations.] The extent of such damage must be proved as a fact."

(*Fields v. Riley* (1969) 1 Cal.App.3d 308, 313.) “The focus of an award of damages is the quantification of detriment suffered by a party. [Citation.] [¶] ‘Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty.’ [Citation.] ‘The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.’” (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396-397.) “[D]amages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.” (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989.)

a. Value of Hong’s Lost Ownership Interest

Based on Civil Code section 3300’s measure of damages for breach of contract – “the amount which will compensate the party aggrieved for all the detriment proximately caused [by the breach], or which, in the ordinary course of things, would be likely to result therefrom” – Hong contends she is entitled to recover the value of the 50-percent ownership interest in the Garden Grove spa that she lost because of Respondents’ breach of the contractual and other duties they owed her. According to Hong, the value of that lost interest was at least \$1.25 million as shown by (1) the evidence establishing the price Respondents paid to acquire their 50-percent ownership interest, and (2) Won Beom’s testimony about the value he assigned to his ownership interest at the time the landlord evicted the business from the property where the spa was located. This evidence is insufficient to support a jury award to Hong for \$1.25 million or any other amount.

Although the evidence shows Respondents paid \$1.25 million to acquire a 50-percent interest in the Garden Grove spa, that same evidence also shows they paid that amount in March 2004, which is more than six years before they allegedly breached their duties and deprived Hong of her 50-percent interest in the spa. A sale of the same

property may be evidence of that property's value, but the sale must be within a reasonable time before or after the date of the valuation at issue. (See Evid. Code, § 815 [sale of same real property may be evidence of property's value if sale was "within a reasonable time before or after the date of valuation"].) Six years is not a reasonable time and Hong makes no attempt to show it is. That earlier transaction does not establish the value of Hong's interest in the spa at the time of Respondents' allegedly wrongful conduct.

To support her contention, Hong cites *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672, and Revenue and Taxation Code section 110, subdivision (b). Neither supports Hong's argument. In *Nichols*, the court used a stock purchase agreement to determine the value of a shareholder's interest in a business. The *Nichols* court, however, did not use the price the shareholder paid at the time he entered into the stock purchase agreement to calculate the present value of the shareholder's interest; rather, it used the formula that agreement established for calculating the value of a shareholder's interest upon withdrawing from the business. The court used the formula and the then-current information to determine the value of the shareholder's interest at the relevant time. (*Nichols*, at pp. 664-665, 671-672.) Revenue and Taxation Code section 110, subdivision (b), defines the terms "'full cash value' [and] 'fair market value' of real property, other than possessory interests" for purposes of the Revenue and Taxation Code provisions regarding property taxation. (See Rev. & Tax. Code, §§ 101, 110, subd. (b).) This action does not involve any taxation matters nor does it involve the value of real property. The definition and provisions on which Hong relies therefore are inapplicable.

Similarly, the testimony by Won Beom to which Hong cites as a valuation of Won Beom's 50-percent ownership interest in the Garden Grove spa in or around the time the landlord evicted the business would not support an award of \$1.25 million to Hong. Specifically, Hong cites Won Beom's testimony that he was willing to provide his

daughter the \$300,000 the landlord required for a new lease to avoid losing the \$1.25 million he had invested when he purchased his interest in 2004. This testimony in no way purports to value Won Beom's 50-percent interest at the time the landlord evicted the business. Rather, it merely acknowledges the amount Respondents paid to acquire their 50-percent interest that would be lost if they did not pay the amount the landlord required for a new lease. The authorities Hong cites concerning an owner's ability to testify on the value of his or her property therefore are inapplicable.⁵ (See *Windeler v. Scheers Jewelers* (1970) 8 Cal.App.3d 844, 853; *Birkhofer v. Krumm* (1938) 27 Cal.App.2d 513, 541.)

b. Amount of Lost Profits

Hong also contends she presented sufficient evidence to support an award of damages based on the past and future profits from the spa that she lost because Respondents locked her out and started a new spa business without her. According to Hong, the evidence was sufficient to support an award based on (1) Joung Hee's testimony that the spa's sales for May and June 2010 exceeded \$53,000 and \$57,000, and (2) Hong's testimony that the spa's profits when she managed it from October 2008 to May 2010 ranged from \$30,000 to \$50,000 per month for most of the year, and from

⁵ In a footnote, Hong contends the trial court erred in sustaining an objection to her proffered testimony regarding the value of her interest in the spa. Specifically, her counsel asked her whether she "had the belief that your spa or your interest in the spa was worth at least \$1.25 million" in May 2010. The trial court sustained an objection that Hong's personal beliefs were irrelevant. In arguing this ruling was error, Hong ignores that shortly before that question her counsel had asked if she had an opinion about the value of her interest, and the trial court sustained an objection that she had not established a foundation for her to express an opinion about the value of the spa because she admitted she did not spend any time there. Hong fails to point to anywhere in the record where she established the foundation required for her to express any opinion or belief about the spa's value.

\$20,000 to \$30,000 per month during the summer. We do not find her argument persuasive.

“Where an established business’s operation is prevented or interrupted, “damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.”” (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 287-288 (*Parlour Enterprises*); see *Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883 (*Kids’ Universe*).) “The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no [interruption or loss of business]. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery.” (*Kids’ Universe*, at p. 883.) Without sufficient evidence to establish the amount of lost profits with reasonable certainty, there is no basis for an award of lost profits. (*Parlour Enterprises*, at pp. 287-288; *Kids’ Universe*, at p. 883.) “The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits.” (*S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 536 (*Anderson*).)

Here, the lack of sufficient evidence to support an award of lost profits is demonstrated by Hong’s failure to identify the amount of lost profits the jury could have awarded based on the evidence presented. Hong simply argues the evidence was sufficient to support an unspecified award based on the spa’s sales from May and June 2010 and her own estimates about the spa’s monthly profits from October 2008 and May 2010. Even if we ignore Hong’s failure to specify an amount or even a range of lost profits the jury could have awarded, this evidence still is insufficient to support an award of lost profits in any amount.

The amount of sales for a two-month period cannot support an award of lost profits because it is only one of several factors that must be considered in determining lost profits. A damage award for lost profits must be based on net profits, which are ““““the gains made from sales “after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.”””” (*Parlour Enterprises, supra*, 152 Cal.App.4th at p. 287; see *Kids’ Universe, supra*, 95 Cal.App.4th at p. 884.) To recover lost profits, a plaintiff must show loss of net pecuniary gain, not just loss of gross revenue. (*Ibid.*) Hong does not provide any of the other information necessary for a jury to make an award of lost profits based on the sales generated during May and June 2010.⁶

Hong’s estimates about the amount of profits the spa generated when she allegedly managed it between October 2008 and May 2010 also are not sufficient to support an award of lost profits. Hong points to her testimony stating, “I think [it] may have been true” that the net profits for the winter during that time period ranged from \$30,000 to \$50,000 per month and the profits for the summer “probably” ranged from \$20,000 to \$30,000 per month. Immediately before that testimony, however, Hong testified she had no personal knowledge about the operations of the Garden Grove spa during this time because Howard operated the business. Even ignoring Hong’s admitted

⁶ Moreover, the testimony Hong cites is not sufficient to establish the sales from this two-month period. Hong relies on Joung Hee’s testimony, but Joung Hee simply repeated the entries on handwritten spreadsheets the spa’s employees allegedly kept about daily sales. The spreadsheets themselves were never admitted into evidence because the trial court sustained objections to them based on relevancy and foundation. Hong contends the trial court erred in sustaining the relevancy objections because the sales are relevant to her damages. Hong, however, fails to explain how the trial court erred in sustaining the foundation objection and thereby forfeited any challenge to that ruling. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074 [“It is appellant’s ‘burden on appeal to affirmatively challenge the trial court’s evidentiary ruling, and demonstrate the court’s error’”; failure to do so forfeits appellant’s challenges to evidentiary rulings].)

lack of personal knowledge, these broad ranges do not provide a satisfactory basis for awarding lost profits with any degree of reasonable certainty, especially when the lost profits Hong seeks are from a new business that was started two months after Howard died and she surrendered control of the original spa.

As explained above, Respondents' daughter, Eun Joo, signed a new lease with the landlord after the original spa business was evicted based on Howard's failure to pay the rent. That new lease required a \$300,000 deposit in addition to the regular monthly rent, and then Eun Joo spent between \$600,000 and \$700,000 to refurbish the run down spa facilities. These expenditures would have a significant impact on the spa's net profitability until they were paid off, but Hong presented no evidence to show how these expenditures impacted profits and also no evidence to show the expenses and revenue of the new spa were the same as or similar to the original spa.

Although estimates may be used to support an award of lost profits and other damages, "the law also compels the plaintiff to present 'the best evidence . . . [of damages] of which the nature of the case is capable'" to establish the amount of damages with reasonable certainty. (*Anderson, supra*, 24 Cal.App.4th at p. 537; *Parlour Enterprises, supra*, 152 Cal.App.4th at pp. 287-288; *Kids' Universe, supra*, 95 Cal.App.4th at p. 883.) An award based on the broad and unsupported estimates Hong presented would amount to nothing but speculation and conjecture because Hong provides no reasonable basis for her estimates, the range of the estimates are so broad as to create significant uncertainty in any award, and the estimates relate to a different spa business. The trial court therefore properly concluded this was insufficient to submit Hong's claims to the jury.⁷

⁷ Hong also points to Joung Hee's testimony about the sales from May and June 2010 as support for these estimated profits, but again sales information alone is not sufficient to demonstrate profits. (*Parlour Enterprises, supra*, 152 Cal.App.4th at p. 287; see *Kids' Universe, supra*, 95 Cal.App.4th at p. 884.)

Finally, Hong suggests that the trial court applied an unreasonably high standard because the law recognizes a plaintiff's burden to establish the amount of lost profits with reasonable certainty should be lessened when the defendant's wrongdoing prevents the plaintiff from establishing the amount of lost profits with greater certainty. (See *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1140.) The record does not support this assertion. Hong and Howard managed the spa during the 17-month period for which she provides the estimated range of monthly profits and Hong provides no evidence or explanation to show why she could not provide more specific numbers for the time during which she and Howard controlled the spa. Hong also provides no evidence or explanation to show how Respondents did anything to prevent her from presenting more specific evidence.

3. The Declaratory Relief and Constructive Trust Claims Did Not Require a Showing of Damages

Hong contends the trial court erred in dismissing her declaratory relief and constructive trust claims because damages are not an essential element of those claims, and therefore any failure to establish damages did not justify dismissal. We agree.

a. Declaratory Relief

Under Code of Civil Procedure section 1060, "Any person interested under a written instrument . . . or under a contract, or who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. . . ." (Code Civ. Proc., § 1060.) "The remedy of declarative relief is cumulative and does not restrict any other remedy." (*Doan v.*

State Farm General Ins. Co. (2011) 195 Cal.App.4th 1082, 1096 (*Doan*); see Code Civ. Proc., § 1062.)

“‘[D]eclaratory relief is designed in large part as a practical means of resolving controversies, so that parties can conform their conduct to the law and prevent future litigation.’ [Citation.] ‘Resort to declaratory relief therefore is appropriate to attain judicial clarification of the parties’ rights and obligations under the applicable law.’” (*Doan, supra*, 195 Cal.App.4th at p. 1095.) “[D]eclaratory relief “‘operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.’”” (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403.)

The only essential element of a claim for declaratory relief is the existence of an actual and present controversy between the parties relating to their legal rights and duties. (*Market Lofts Community Assn. v. 9th Street Market Lofts, LLC* (2014) 222 Cal.App.4th 924, 931 (*Market Lofts*).) “‘A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court.’” (*Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 221 (*Lockheed*), disapproved on other grounds in *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1036, fn. 11.) “Given its prospective nature, a declaratory relief award need not include damages.” (*Doan, supra*, 195 Cal.App.4th at p. 1096.)

If the facts presented establish an actual and present controversy between the parties, “‘the court should declare the rights of the parties whether or not the facts [presented] establish that the plaintiff is entitled to a favorable declaration.’” (*Lockheed, supra*, 134 Cal.App.4th at p. 221; see *Market Lofts, supra*, 222 Cal.App.4th at p. 931.)

Indeed, ““it has been held that where the plaintiff is not entitled to a favorable declaration, the court should render a judgment embodying such determination and should not merely dismiss the action.”” (*Patel v. Athow* (1973) 34 Cal.App.3d 727, 734.)

Here, Hong sought a judicial declaration that the new spa business Eun Joo and Joung Hee operate at the same location as the original spa business is merely a continuation of that original business, and therefore the Business Partnership Agreement between Hong and Won Beom granting Hong a 50-percent ownership interest in the original business entitles her to a 50-percent ownership interest in the new spa business. This claim does not seek an award of damages, but rather a judicial determination declaring Hong’s rights in the new spa business. The evidence presented established an actual and present controversy between the parties relating to Hong’s rights in the new business entitling her to a judicial declaration of those rights regardless of whether the declaration is favorable. The court’s determination Hong failed to present sufficient evidence to establish her damages on her other claims does not resolve this controversy because the amount of damages Hong allegedly suffered has no bearing on whether she has an ownership interest in the new spa business. Accordingly, the trial court erred in dismissing Hong’s declaratory relief claim on this ground.⁸

b. Constructive Trust

““A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner. [Citations.] The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing. . . . [A] constructive trust may only be imposed where the following

⁸ In concluding the trial court erred in dismissing Hong’s declaratory relief claim, we express no opinion on whether Hong ultimately is entitled to a favorable or unfavorable declaratory judgment.

three conditions are satisfied: (1) the existence of a *res* (property or some interest in property); (2) the *right* of a complaining party to that *res*; and (3) some *wrongful* acquisition or detention of the *res* by another party who is not entitled to it.’ [Citation.] ‘[A] constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled.’” (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1069 (*Burlesci*); see *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990 (*Communist Party*).)

“‘The principal circumstances where constructive trusts are imposed are set forth in Civil Code sections 2223 and 2224. Section 2223 provides that “[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.” Section 2224 states that “[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”’” (*Burlesci, supra*, 68 Cal.App.4th at p. 1069; see *Communist Party, supra*, 35 Cal.App.4th at p. 990.)

A plaintiff seeking a constructive trust need not show any specific amount of damages he or she suffered because the claim entitles a successful plaintiff to a judgment directing the defendant to transfer specific property to the plaintiff, not pay any damages. Indeed, damages are nowhere mentioned in the three conditions necessary to impose a constructive trust. (See *Burlesci, supra*, 68 Cal.App.4th at p. 1069; *Communist Party, supra*, 35 Cal.App.4th at p. 990.)

Here, Hong seeks a judgment compelling Respondents to convey to Hong the 50-percent ownership interest she claims in the new spa business based upon her 50-percent ownership interest in the original spa business. Nothing in Hong’s requested relief required her to establish the amount of monetary damages she allegedly suffered because of Respondents’ wrongful conduct. The trial court therefore erred in dismissing this claim.

4. The Trial Court Did Not Abuse Its Discretion in Denying Hong's Motion to Reopen Her Case

Hong contends the trial court erred in denying her motion to reopen her case to present additional evidence of damages after the court granted Respondents' nonsuit motion. According to Hong, the trial court had a duty to allow her to reopen her case and its failure to do so is reversible error. We disagree.

After a defendant moves for nonsuit, the trial court must allow the plaintiff to reopen his or her case and present further evidence to address any evidentiary deficiencies identified by the motion. "It is error to refuse this privilege and, after such refusal, to grant a motion for nonsuit." (*Anderson, supra*, 24 Cal.App.4th at p. 538; see *Huang v. Garner* (1984) 157 Cal.App.3d 404, 416, disapproved on other grounds in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 648-649.) One purpose of a nonsuit motion is to point out oversights and defects in the plaintiff's proof before the defendant has put on his or her evidence so that the plaintiff may correct any shortcomings when the defendant still has an opportunity to respond. (*Ibid.*) This right to reopen, however, does not apply here.

As explained above, Respondents' motion was in legal effect a motion for directed verdict rather than a motion for nonsuit because they brought the motion after the parties had completed their evidentiary presentations to the jury. (See *Brown v. Wells Fargo Bank, N.A.* (2012) 204 Cal.App.4th 1353, 1356 [substance and effect of motion or order controls over form]; Civ. Code, § 3528 ["The law respects form less than substance"].) A plaintiff does not have a right to reopen his or her case after all parties have rested and the defendant moves for directed verdict. (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793 (*Sanchez*); *Keppelman v. Heikes* (1952) 111 Cal.App.2d 475, 483-484.) Instead, whether to allow a plaintiff to reopen his or her case following a motion for directed verdict is vested in the trial court's sound discretion

and will be overturned on appeal only for an abuse of that discretion. (*Sanchez*, at p. 793.)

Here, Hong asked to reopen her case not only after all parties had rested, but after the trial court already had granted Respondents' motion. Hong asked to reopen to recall Respondents to question them about the spa's "bank statements and finances" so she could establish either the amount of lost profits or the value of her ownership interest. "A motion to reopen a case for further evidence [after a directed verdict motion is made] can be granted only on a showing of good cause." (*Sanchez, supra*, 116 Cal.App.3d at p. 793.) Hong failed to make a showing of good cause either in the trial court or here. She had a full and fair opportunity to question both of Respondents during the trial and provided no explanation why she did not question them about these matters. Before she concluded her evidentiary presentation Hong was aware the trial court might not allow accountant Kim to testify because of her failure to designate him as an expert, but she still did not seek to solicit this financial information from Respondents before the parties rested. On this record, we cannot say the trial court abused its discretion in denying Hong's request to reopen.

Moreover, even if we treat Respondents' motion as a nonsuit motion, Hong did not have a right to reopen her case because she untimely made her request after the trial court already had granted the nonsuit motion. "[T]he trial court has discretion to refuse a request to reopen where plaintiff *had* the opportunity to make such request before nonsuit was granted and failed to do so." (Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2015) ¶ 12:241, p. 12-53; see *John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 162 [right to reopen case to present further evidence inapplicable when plaintiff failed to make request before trial court ruled on nonsuit motion]; *Onick v. Long* (1957) 154 Cal.App.2d 381, 388 (*Onick*).)

In *Onick*, the day after the trial court granted the defendant's nonsuit motion, the plaintiff moved to reopen his case to present testimony from an additional

witness, but the plaintiff made no showing to explain why the witness was not presented earlier. The trial court denied the request. In affirming the nonsuit, the *Onick* court acknowledged the trial court “might well have [erred]” in denying the request to reopen if the witness “had been produced and his evidence offered after the motion for nonsuit was argued and before the court acted on it But where a party has rested, and after a nonsuit has been granted on a subsequent day seeks to reopen his case, in the absence of a showing of reasonable grounds for the delay in offering the witness we are satisfied that the trial court commits no abuse of discretion in refusing to permit the reopening of the case to allow such testimony to be introduced out of order.” (*Onick, supra*, 154 Cal.App.2d at p. 388.)

Here, Respondents made their nonsuit motion and both sides argued about the adequacy of Hong’s evidence on damages. In response, the trial court repeatedly explained that none of the evidence Hong identified appeared sufficient to support an award of damages on her claims, that it was inclined to grant the motion, and that Hong should consider whether she presented all the arguments she had on the issue. Nonetheless, Hong did not ask to reopen her case or suggest she had additional evidence that might support her damages claim. Despite its stated intention to grant the motion, the trial court took it under submission and stated it would rule the next time the trial convened. Two days later, the trial resumed and the court granted nonsuit against Hong based on her failure to present sufficient evidence of damages. The court then considered argument on Hong’s motion for nonsuit on the complaint Joung Hee and her siblings filed against Hong. During the middle of the argument on that motion, Hong for the first time requested to reopen her case on the cross-complaint to present additional evidence of damages. The trial court denied the request, explaining it was too late and Hong provided no explanation why she did not ask Respondents questions about the spa’s finances when she questioned them during trial. As in *Onick*, we cannot say this was an abuse of discretion.

III
DISPOSITION

The judgment is affirmed in part and reversed in part. The judgment is reversed on Hong's claims for declaratory relief and constructive trust, but affirmed in all other respects. The matter is remanded to the trial court for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.